U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

C1

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 07 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the AAO's previous decision will be affirmed and the petition will be denied.

The petitioner is a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a teacher's aide. The director determined that the petitioner had not established that position does not qualify the beneficiary for immigration benefits, because the position is only part-time. The AAO affirmed the director's decision and dismissed the appeal.

The regulation at 8 C.F.R. § 204.5(m)(1) indicates that the "religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition." This regulation reflects language at section 101(a)(27)(C)(iii) of the Act, 8 U.S.C. § 1101(a)(27)(C)(iii).

The director and the AAO determined that part-time work cannot fulfill the statutory and regulatory requirement of continuous employment during the two-year qualifying period. Counsel, on motion, repeats the argument that past employment need not be full-time to qualify an alien for special immigrant religious worker status. Counsel also contends that the beneficiary worked full-time, if one considers her off-site preparatory work.

8 C.F.R. § 103.5(a)(3) states that a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel cites two unpublished, non-precedent appellate decisions, which counsel had previously cited on appeal. The AAO, in its dismissal notice, had already observed that the cited decisions are not precedent decisions. Citing the same decisions again does not conform to the requirements of a motion to reconsider.

Counsel, on motion, acknowledges that the decisions are not published precedents, but counsel asserts that the regulations do not define "continuously," and that "there are no cases on point." While there are no published AAO precedent decisions regarding this issue, the term "continuously" is discussed in a 1980 precedent decision where the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980). This case law establishes that the number of hours worked per week is relevant to the question of whether an alien's religious work is continuous. The AAO's prior failure, in the unpublished decisions cited by counsel, to take *Matter of Varughese* into account does not oblige the AAO to continue to disregard that case law.

Materials in the record show that the beneficiary obtained "other earnings" as a "Banquet Server" during the qualifying period. The record offers no other details regarding this work, nor any information to show that it was related to her teaching work. Turning again to case law pertaining to religious workers, the term "continuously" has been interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948). If, pursuant to *Matter of Varughese*, seminary studies are

interruptive of religious work as a minister, then it is reasonable to conclude that the pervasively secular, paid work of serving at a banquet interrupts the continuity of religious teaching. The regulation at 8 C.F.R. § 204.5(m)(2) clearly states that not everyone employed by a religious institution engages in a qualifying religious occupation; therefore, the fact that a church was involved with the banquets is irrelevant. The petitioner has not shown or claimed that food service is a traditional religious function within its denomination.

Counsel argues, on motion, that the beneficiary did considerable unpaid "out of classroom" preparatory work, in addition to the hours for which she was paid. The implication, apparently, is that if these hours were factored into the beneficiary's typical work week, then she would qualify as a full-time employee. Counsel states that the beneficiary "worked an average of 29 hours a week as a teachers aid [sic]. In addition, outside of the classroom, she was required to prepare lesson plans, review teaching materials, teach and train children after regular school hours and meet with parents. (See attached copy of previously submitted letter from Accounting Operations Manager human resource department)." The letter in question contains nothing to corroborate the new claim that the beneficiary has performed additional, unpaid work beyond her paid working hours. Given that officials of the petitioning church have specifically stated that the beneficiary "works part-time (three days a week)," any attempt by counsel to assert a claim of full-time work must not only be substantiated in itself, but it must also credibly overcome a contradictory assertion by the petitioner.

Pursuant to 8 C.F.R. § 103.5(a)(3), a motion to reconsider a decision on an application or petition must establish that the decision was incorrect based on the evidence of record *at the time of the initial decision.* Here, the initial record contained no mention of additional, unpaid work hours. Counsel's new claim, therefore, does not and cannot show that the director or the AAO made incorrect decisions based on the evidence and information then available. (An entirely new claim, never before considered, cannot be *re*-considered.) Furthermore, this new claim is unsubstantiated. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

With regard to the claim that the beneficiary "worked an average of 29 hours a week," figures provided by the petitioner show an average work week of less than 24 hours. The hours are reported in a table that shows biweekly totals. The lowest number is 18 hours, and only three out of 53 periods show 58 or more hours (the minimum for two 29-hour weeks). Thus, apart from the question of whether a 29-hour work week would suffice, even a cursory review of the table refutes the claim of a 29-hour average work week.

Counsel's motion consists of little more than repetition of already-answered arguments and unsubstantiated new claims (which have no place in a motion to reconsider). Past AAO decisions, never published as precedents, do not take on greater authority simply because a non-governmental third party has chosen to reprint redacted versions of those decisions.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of July 17, 2003 is affirmed. The petition is denied.